No. 16,231

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIVIDAD SALINAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Second Judicial Division.

BRIEF FOR APPELLANT.

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Cases

Statutes

The defendant was indicted of the alleged crime of arson pursuant to (Sections 65-5-1 and 6 ACLA 1949 as duly amended by chapter 141 of the 1957 Session Laws) Count One of such indictment alleging the commission of the act of arson in the first degree and, Count Two alleging the commission of the act with the intent to injure and defraud an insurer. (Tr. pages 3 and 4.)

The defendant was found not guilty of Count One and not guilty of Count Two of such indictment.

The indictment did not charge the defendant with having violated Sec. 65-5-2 designated as arson second degree. The jury, however, found the defendant guilty of arson second degree as defined in Sec. 65-5-2.

ARGUMENT.

IN THE ABSENCE OF THE INDICTMENT SPECIFICALLY PLEADING THE OFFENSE OF ARSON IN THE SECOND DEGREE, THE JURY WAS NOT JUSTIFIED IN MAKING SUCH FINDING.

There was no pleading in the indictment of the charge of arson second degree. (Tr. pages 3 and 4.) The only possible theory that may have inspired the jury to make this independent finding was that the jury could have contemplated that arson second degree was an included offense in arson first degree.

A reading of both sections marks the distinction between arson first degree and arson second degree, thus indicating that in arson second degree, the building or structure to be burned is the type not enumerated in the class of buildings set forth in arson first degree.

Numerous jurisdictions having statutes similar to the one under consideration, furthermore, under Federal rules a defendant may be found guilty of a lesser offense than the one charged provided such is included in the greater offense.

The test has been aptly applied by this Court in the case of *Giles v. United States,* 144 F. 2d 860, where Judge Denman stated as follows:

> "The appellee properly states the rule regarding the character of a lesser offense on which an instruction is warranted, as 'To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.' *House v. State,* 186 Ind. 593, 117 N.E. 647."

If we are to apply this rule to the instant proceeding before the Court, it is quite apparent that arson second degree is not deemed to be deemed an included offense, since arson first degree may be committed without having first committed the lesser offense. For illustration, should the accused maliciously and wilfully have burned some property which in no manner is enumerated in arson first degree, such an act may furnish a basis for prosecution in arson second degree and yet not be included in the provisions set forth in arson second degree.

The *Giles* citation (supra) follows the reasoning of *House v. State* lending approval to the legal reasoning in such case.

In the *House* case, the defendant was charged with kidnapping. The Court below, upon failure to find

the defendant guilty of kidnapping, found him to be guilty of a lesser offense, namely, of assault and battery. In the reversal by the Indiana Supreme Court, the Appellate Court stated as follows:

> "It is admitted by all that section 2147, Burns 1914, which relates to convictions of a lesser degree upon a charge of an offense of a higher degree, where the offense consists of different degrees, does not control the question here presented, and that section 2148, Burns 1914, is controlling. That section provides that:
>
> > 'In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that which he is charged in the indictment or affidavit.'
>
> Appellants were found guilty of assault and battery, which by section 2242, Burns 1914, is defined as:
>
> > 'Whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery.'
>
> The Attorney General, in his brief for appellee, admits that the controlling question here is whether the offense of assault and battery is included in a charge of kidnapping. In the case of *Polson v. State* (1893) 137 Ind. 519, 35 N.E. 907, the court, in deciding the question of whether assault and battery with intent to commit the crime of rape was included in the crime of rape, said:
>
> > 'It is true that a misdemeanor may be merged in a felony, but as a general rule one felony is not merged into another; especially is this true where the felonies are of the same grade. The crime of assault and battery with intent to com-

> mit rape, and the crime of rape, are both felonies belonging to the same class. It is impossible to conceive of rape without an assault and battery for that purpose. The crime of rape necessarily includes an assault and battery with intent to commit a rape.'
>
> In the case of *Ross v. State* (1870) 33 Ind. 167, an attempt was made to sustain a conviction for assault and battery under an information which charged the rescue of a prisoner, upon the theory of the one being necessarily included in the other, as provided by statute. The court held that an assault and battery was not necessarily included in the rescue of a prisoner.
>
> It would seem from these authorities that, to be necessarily included in the greater offense, the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser. This being true, the court is compelled to hold that, if a party is charged with a given crime, he cannot be convicted of another crime of lesser magnitude under the provisions of section 2148, supra, unless a conviction of the crime charged necessitates proof of all the essential elements of the lesser offense, together with the added element which makes the difference in the two offenses. It cannot be said that it is impossible to make full proof of a charge of kidnapping without proving a rude, insolent or angry touching of the person.''

The case of *State v. Franklin,* 79 S.E. 2d 692, following the ruling of the *Giles* case, reiterates this philosophy emphatically. (Tr. p. 702.)

> "The case at bar involves a principal who, under the evidence, if he acted at all in a criminal way, aided and abetted the principal perpetrator of the crime. Under the evidence in this case, the jury should have found the defendant guilty of rape as principal in the second degree or not guilty. In order for an attempt or any other lesser crime to be included in the greater crime, the lesser crime must 'be such that it is impossible to commit the greater without first having committed the lesser.' *Giles v. United States,* 9 Cir. 144 F.2d 860, 861; *United States v. Barbeau,* D.C 92 F. Supp. 196; *Barbeau v. United States,* 9 Cir. 193 F.2d 945."

Had the prosecution alleged arson second degree on an independent and distinct count in the indictment, affording the defendant an opportunity to meet such issue, the jury on such basis, if such plea were fully sustained by the prosecution, would be fully justified in making such finding.

The appellant rests the entire case on the sole argument deeming same sufficient to merit a reversal, particularly when a verdict of not guilty has been found in both of the counts included in the indictment.

Dated, June 29, 1959.

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